SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1006

CONTINENTAL OIL COMPANY,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Point I

In determining Elk Basin's invested capital by reference to the assets underlying the stocks acquired, the Court of Claims erred and by its error has enshrouded well settled legal principles in doubt.

The legal principles governing the elements of invested capital and the computation thereof have been settled and established by a long line of decisions, and although some of those cases were decided under earlier Revenue Acts, they are equally pertinent and their principles equally applicable to the problems of invested capital arising under the current Revenue Acts.

The Court of Claims, by its judgment in the instant case, has reflected on the authority of those cases and the relevancy of their principles and has left the problems of the make-up and computation of invested capital in hopeless doubt. For the court in fixing the amounts at which Elk Basin's acquisitions of stock on January 1 and March 15, 1920 should be included in invested capital and in determining Elk Basin's invested capital to be the sum of $7,926,731.74, relied on and was guided solely by the certificate of over-assessment (opinion R. 26) and thus perpetuated the error of the Commissioner of Internal Revenue which it conceded it was under a duty to correct.

The Commissioner, in issuing the certificate, disregarded the mandate of Section 326, Revenue Act of 1918, that the actual cash value of the tangible property (which under Section 325 included stocks) paid in for Elk Basin shares should be included in its invested capital. That certificate discussed, computed and gave effect only to the value of the assets underlying the stocks of Keoughan-Hurst, Grass Creek and of the Mutual Group and ignored entirely the values of those stocks themselves (Plaintiff's Ex. 3, Schedule 2, Paragraphs a, b, c). The certificate furthermore applied to the tangible property, i. e., the stocks acquired by Elk Basin on March 1 and on March 15, 1920, the limitations governing intangible property prescribed in subdivision 5 of Section 326A. Indeed, those very paragraphs state frankly that the limitation prescribed for intangibles is being applied to the tangible property which Elk Basin acquired.

By citing its own decision in *United Cigar Stores* v. *United States*, 62 Court of Claims, 134, the Court of Claims recognized the principle that if the tangible property paid in for the taxpayer's stock consists of the shares of another corporation, it is the value of the shares acquired which

must be included in the taxpayer's invested capital, and this is true even though the taxpayer may subsequently acquire the underlying assets of that other corporation. The acquisition of the shares, and the later acquisition of the assets, are two entirely separate and distinct transactions. The court's failure to abide by this principle, established not only by the *United Cigar Stores* case but by the cases of *Regal Shoe Co.*, 1 B. T. A. 896; *Guantanamo Sugar Company* v. *Helvering*, 85 F. (2d) 252; *Golding Sons Company*, 13 B. T. A. 889; *Ralston Steel Car Co.* v. *Commissioner*, 53 F. (2d) 948; *Stutz Motor Car Co.*, 80 F. (2d) 623; *Sentinel Publishing Co.*, 8 B. T. A. 325, makes imperative a review by this court, not merely to right a palpable injustice in the individual case of the Continental Oil Company but to do away with the doubt which must inevitably arise as to the continued authority of the cases which we have just cited and which have never been overruled or their authority questioned until now. The court's decision in the instant case is in irreconcilable conflict with those cases and a definitive settlement of that conflict by this court is essential to intelligent understanding by taxpayers and a proper administration by the courts and the Commissioner of the law which governs the determination of invested capital.

Point II

The Court of Claims failed to make any finding as to a material issue in the case.

The Court of Claims stated correctly that "the entire issue in the case is a relatively simple one: namely, the actual cash value of certain stocks of other corporations paid in for stock of Elk Basin Company." The court failed to meet that issue, however, for it failed to make any finding whatsoever on the question which is deter-

minative of it, to wit: what was the market value of the Elk Basin stock issued on January 1 and on March 15, 1920. This question presented a material issue indeed, for the value of the stocks of other corporations paid in for the Elk Basin stock is dependent upon and is determined solely by the market value of the Elk Basin stocks issued for them.

Repeated adjudication has settled beyond dispute that where a corporation issues its shares of stock in exchange for other property (including the stocks of other corporations) it is the value of the stocks so issued which determines the value of the property acquired. *Pierce Oil Corporation* v. *Commissioner,* 32 B. T. A. 403, 430; *Farmers Cotton Oil Company,* 27 B. T. A. 105, 115; *Ambassador Petroleum Company,* 28 B. T. A. 868, 873; *Holby Corporation* v. *Commissioner,* 28 B. T. A. 1092, 1105; *Seymour Manufacturing Company,* 19 B. T. A. 1280, 1285; *Swiss Oil Corporation* v. *Commissioner,* 32 B. T. A. 777.

The record teems with evidence of the market value of Elk Basin stock on the days in question and this fact renders all the more inexplicable the court's failure to make any finding of fact as to that value. The court's findings included the market prices of Elk Basin stock on the New York Curb Exchange, the market place where willing buyers and willing sellers met to fix prices. Those prices extend over a period commencing nearly three months prior to January 1, 1920 and continuing for some time after March 15, during which period hundreds of thousands of Elk Basin shares changed hands.

The record and the findings are barren of proof that any of the factors to which the Court of Claims referred as casting doubt on the importance of these prices as criteria of value, impeded in any way the free and untrammeled play of the laws of supply and demand on the Curb Exchange. On the contrary, the defendant's own Exhibit F shows that the prices made on that Exchange were the fair market

values of the stock established as a result of supply and demand on an active market place during a period "of great activity in petroleum company stocks" and when "the oil companies were for the most part operating with marked success and their securities were in demand." Furthermore the Commissioner himself recognized and admitted (Plaintiff's Ex. 3, Schedule 2, paragraph a) that Elk Basin shares had a market value on January 1, 1920 of $7.50 per share, and this admission was made at a time when he was already aware of all the facts which the Court of Claims deemed inflationary. The market place furnishes the criterion of value of listed securities. It may not be disregarded at whim or caprice.

The court therefore erred not only in its failure to make any finding whatsoever on this material issue but in its failure to make those findings as to the market value of Elk Basin stock requested by the plaintiff.

Point III

The ultimate finding of fact as to Elk Basin's invested capital (Finding 19) is not sustained by the Court's findings of evidentiary or primary facts (Findings 11 and 14).

The crucial finding of fact which the Court did make was Finding 19 to the effect that Elk Basin's invested capital for the year 1920, including its acquisitions of stock on January 1 and March 1 was $7,926,731.74. The importance of this Finding lies in the fact that on the amount of Elk Basin's invested capital depended its actual tax liability for that year and hence, the amount of the refund to which it was entitled.

But that important finding is not sustained by those findings of evidentiary or primary facts which the Court made (Findings 11 and 14). The amounts at which the acquisitions of the Grass Creek, Keoughan-Hurst and Mutual

Group stocks were included in the invested capital as found are indicated in Finding 11. But it is apparent from Finding 14 (the Curb Exchange prices of Elk Basin stock issued for those acquisitions) that the value of Elk Basin stock (and hence the value of the stocks acquired) was far in excess of the amount at which those acquisitions were included in invested capital. The cases which we have cited under Point II established that it is the value of Elk Basin stock which determined the value of the stocks acquired and hence determines the amounts at which the acquisitions must be included in invested capital.

The court has also found (Finding 11) that the shares of Grass Creek stock were included in invested capital at the sum of $1,000,000. Since Elk Basin issued 133,333⅓ of its own shares for the Grass Crek stock, it is clear that Elk Basin stocks were valued at $7.50 per share on January 1, 1920 and so indeed the Commissioner of Internal Revenue admitted in the certificate of over-assessment (Plaintiff's Ex. 3, Schedule 2, paragraph a). But although the Keoughan-Hurst stocks were acquired on the same day, the shares of Elk Basin stock issued for them on that same day were not accorded the same value as those issued for the Grass Creek stock. Elk Basin's invested capital included both the stocks of Grass Creek and of Keoughan-Hurst and the value of each must be measured by the same standard, to wit: the value of the Elk Basin shares issued for them. When that standard is both applied and disregarded at the same moment in relation to similar transactions, the utlimate finding of Elk Basin's invested capital is without integrity.

Point IV

The Court erred in its award of interest because of its confusion of the Judicial Code with the Internal Revenue Code. Proper Administration of the revenue laws requires that this Court dispel this confusion and reconcile the apparent conflict between sections of the two codes created by the judgment.

It is obvious that the court has confused Section 177(b) Judicial Code with Section 3771, Internal Revenue Code, for its opinion refers to the amendment of Section 177(b) by Section 614(a)(2) of the 1928 Revenue Act. It is on the basis of that supposed amendment that the court limited interest on the judgment as it did. However, Section 177(b) has not been amended by Section 614(a)(2) of the 1928 Act.

The latter section (which is Section 3771, .I R. C.) is a part of the Chapter 37 of the Internal Revenue Code entitled "Abatements, Credits and Refunds" and deals solely with interest on those refunds allowed by the Commissioner himself acting pursuant to the authority granted to him by Section 3770 of the Internal Revenue Code. Section 177(b), on the other hand, is a part of the Judicial Code and deals with interests on judgments awarded by the courts in actions of which they have jurisdiction. The provisions of law controlling the computation and payment of interest in the two different situations were enacted in separate sections with separate headings in the 1926, 1928 and 1936 Revenue Acts and are now found under separate titles of the United States Code. They show the legislative intent to be that they shall apply under entirely different circumstances.

The use of the term "judgment creditor" in Section 177 (b), together with its reference to a refund check in payment of a judgment, indicates that that section refers only to

interest on judgments awarded by the courts, while Section 3771, Internal Revenue Code refers only to interest on refunds made by the Commissioner without litigation. While the provisions of both sections are designed to stop the running of interest, one applies in ministerial proceedings before the Commissioner only, while the other affects judicial proceedings only. *Bonwit Teller* v. *United States*, 52 Fed. (2d) 904; *Mellon* v. *United States*, 36 Fed. (2d) 609. When a claim for refund has been denied in toto and judgment is recovered on the claim, interest runs from the date of overpayment.

The limitation of interest contained in the judgment of the Court of Claims results from its confusion of the two sections. There has thus been created a conflict between them which although apparent rather than real, requires reconciliation and clarification by this court in the interests of a proper understanding of the law by taxpayers and proper administration of it by the Commissioner and by the courts.

Conclusion

We urge this court to grant the writ of certiorari prayed for not only that the plaintiff, Continental Oil Company may have its rights adjudged, in accordance with the statutes in such cases made a provided, but in order to set at rest the doubts and dispel the confusions in the law which the Court of Claims has so needlessly created and thus to aid in the proper administration of the Revenue Laws of the Nation.

Respectfully submitted,

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